92-283

No. _____

Supreme Court, U.S.
F I L E D
AUG 11 1992
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RONALD L. DIXON AND
DONALD J. NAEGELE,
PETITIONERS,

VERSUS

OGDEN NEWSPAPERS, INC.,
A CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF
WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI (APPENDIX SEPARATE)

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QUESTIONS PRESENTED

1. Did two news articles written by the respondent's news reporter, Warren Bays, and published in the respondent's newspaper on May 3, 1983, which purported to report and quote accurately the substance and highlights of George Stefanow's testimony in his trial on May 2, 1983, for allegedly making a telephone threat to a rookie police officer who had used Stefanow's name to gain admittance to a reputed house of prostitution in a vice raid, imply defamatory assertions about the petitioners, then policemen, which were sufficiently factual to be proven false, where Stefanow testified repeatedly that he discussed the police raid with the petitioners sometime after the raid, where the news articles omitted any reference to the time frame of the discussions, attributed to Stefanow fabricated quotations of having been "alerted" about the rookie officer and of using the petitioners as "sources" of information, and referred to past and present published concerns expressed by the police chief, then a political adversary of Stefanow, over "leaked" information?

a. If so, was the West Virginia Supreme Court of Appeals wrong in concluding that the first-amendment considerations

required it and the trial court to independently review and evaluate the news articles and to find as a matter of constitutional law that the articles, and any connotations reasonably flowing from them, were not defamatory to the petitioners, despite the jury's finding to the contrary?

b. If so, did the West Virginia Supreme Court of Appeals instead actually conduct an independent evaluation of whether or not the alleged defamatory implications were sufficiently factual to be proven false (confusing it with the issue of a defamatory meaning) and correctly find as a matter of constitutional law that the articles, and any defamatory connotations reasonably flowing from them, could not be proven false, despite the jury's finding to the contrary?

2. Was the West Virginia Supreme Court of Appeals correct in finding that the petitioners' evidence of actual malice on the part of the respondent's reporter, Warren Bays, was not clear and convincing as a matter of constitutional law, despite the jury's finding to the contrary?

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I.

OPINION BELOW, JURISDICTION FOR REVIEW, AND CONSTITUTIONAL PROVISIONS INVOLVED

A. Opinion Below

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered on February 27, 1992, by which that court reversed, on appeal, the judgment of the Circuit Court of Ohio County, West Virginia, which had awarded to each of the petitioners, upon jury verdicts in their favor, compensatory damages in the consolidated trial of their separate civil actions for libel.

The opinion of the West Virginia Supreme Court of Appeals which was delivered in support of its judgment of reversal appears in the separate Appendix to this Petition, beginning at page A-5 thereof. The opinion has not yet been printed in

the official West Virginia reports, but now appears in volume 416 of West's South Eastern Reporter (Second Series), commencing at page 237 (416 S.E.2d 237).

B. Jurisdiction for Review

The judgment of the West Virginia Supreme Court of Appeals sought to be reviewed was, as noted above, entered on February 27, 1992. (App., p. A-3.) The petitioners' petition for rehearing, timely filed, was denied by the West Virginia Supreme Court of Appeals by order entered on May 13, 1992. (App., p. A-1.)

This Petition for a writ of certiorari is filed within ninety days from May 13, 1992, and jurisdiction to review the judgment of the West Virginia Supreme Court of Appeals by writ of certiorari is conferred on this Court by title 28, section 1257(a), of the United States Code.

C. Constitutional Provisions Involved

Portions of the first and fourteenth amendments to the United States Constitution are involved in this case. The first amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

And the fourteenth amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II.

STATEMENT OF THE CASE

A. Synopsis of Substantive Facts

The petitioners, Ronald L. Dixon and Donald J. Naegele, commenced separate libel actions in June, 1983, in the Circuit Court of Ohio County, West Virginia, against Ogden Newspapers, Inc., a corporation based in Wheeling, West Virginia, which owns and publishes at least fifteen newspapers in several states, including The Intelligencer. Dixon and Naegele, then veteran policemen of the City of Wheeling, complained of two separate news articles (App., pp. A-144 and A-150) which appeared on May 3, 1983, in The Intelligencer, a morning newspaper published in Wheeling and circulated throughout the Northern Panhandle of West Virginia and surrounding areas of eastern Ohio and western Pennsylvania. Both of the news articles were written by veteran Intelligencer

reporter Warren Bays and purported to report the highlights and substance of the testimony of George Stefanow, who, in his trial in the Magistrate Court of Ohio County, West Virginia, on the preceding day, had been acquitted by a jury of the alleged misdemeanor of threatening Robert Heldreth, a policeman, over the telephone on July 17, 1982.

Heldreth was a rookie Wheeling policeman when, in a police vice raid on July 15, 1982, he reportedly used the names of Stefanow and another gentleman to gain admission to the "Green Door," a reputed house of prostitution located in the section of Wheeling known as Center Wheeling. Stefanow, an outspoken critic of the uppermost echelon of the Wheeling Police Bureau and then a candidate for election to the Wheeling City Council, when told that his name had been used in the raid, became upset over the matter and eventually

telephoned Heldreth to find out who had instructed him to use Stefanow's name. As a result of the telephone call, Stefanow was charged with and tried for allegedly threatening Heldreth by telephone.

In the course of the prosecutor's cross-examination of Stefanow on May 2, 1983, Stefanow was asked to reveal the names of the persons, particularly policemen, with whom he had discussed the raid and Heldreth's participation in it between the time of the raid on July 15, 1982, and the time of his telephone call to Heldreth on July 17, 1982; and Stefanow identified, among others, Dixon, who was a police sergeant, and Naegele, who was Stefanow's brother-in-law and a police patrolman. The questions asked of Stefanow and the answers given by Stefanow were quite clear concerning the post-raid time frame; and the relevant questions and answers,

taken from the transcript[1] of Stefanow's testimony (App., p. A-85), are quoted at a later juncture for the purpose of demonstrating just how clear they were.

Needless to say, the news articles of May 3, 1983, written by reporter Warren Bays, who attended the day-long trial and personally listened to Stefanow's testimony, omitted any reference to the time frame of Stefanow's discussions about the vice raid with officers Dixon and Naegele. With the addition of journalistic garnish in the form of fabricated quotations attributed to Stefanow, in the form of specific reminders of Bays' earlier

[1]The Magistrate Court of Ohio County, West Virginia, is not a court of record. However, because of the "notoriety" associated with the misdemeanor charge against Stefanow, Ohio County Assistant Prosecuting Attorney A. Dana Kahle, who tried the case for the State, insisted upon having a court reporter to ensure that no witnesses, particularly Stefanow, would be misquoted. (Transcript of libel trial, pp. 122-23.)

Intelligencer articles about dissension within the Wheeling Police Bureau and the police chief's professed concern over frustrated police vice raids, and in the form of an elicited promise of the police chief to study Stefanow's testimony to determine "if official police business had been leaked out," the news articles of May 3, 1983, contended Dixon and Naegele, clearly implied that they had been divulging sensitive police information to underworld figures for corrupt motives. The connotations were false, they maintained. The offensive passages of the two news articles of May 3, 1983, are reproduced at a later point for the purpose of demonstrating precisely how misleading the articles were.

B. Synopsis of Procedural Facts

In each of the libel cases, the defendant, Ogden Newspapers, Inc., filed identical motions under Rule 12(b)(6) of

the West Virginia Rules of Civil Procedure, contending therein, among other things, that Ogden "did not publish any libelous or defamatory matter pertaining to . . ." Dixon and Naegele, that the "language" of the published articles "does not constitute . . . a libel nor is it . . . defamatory," and that the common-law fair-report privilege and the constitutionally-based privilege of neutral reportage were applicable. (App., p. A-80.) The trial court first ruled on the motion in the Naegele case and, treating it as a motion for summary judgment, considered, among other things, the transcript of Stefanow's 1983 trial testimony. (App., p. A-85.) By a combined written opinion and order entered on February 28, 1984, the trial court denied the motion. (App., p. A-72.)

Immediately following the trial court's denial of the motion, Ogden petitioned the West Virginia Supreme Court of

Appeals for a writ of prohibition to prohibit the trial court from proceeding further in the Naegele case, alleging therein that the chilling effect on Ogden's first-amendment rights by the mere pendency and prosecution of Naegele's libel action warranted application of the extraordinary remedy because the news articles were substantially true, were not defamatory, and were privileged publications. The West Virginia high court refused, by a vote of three-to-two, to issue a rule to show cause. Thereafter, the trial court, on January 28, 1985, denied Ogden's motion for summary judgment in the Dixon case, expressly adopting the reasons set forth in the trial court's combined opinion and order rendered earlier in the Naegele case.

The two cases then were consolidated for the purposes of discovery and trial, and eventually were tried on October 26,

October 27, and October 31, 1988. The trial court denied Ogden's motion for a directed verdict at the close of the plaintiffs' case in chief and, again, after all of the evidence had been presented. Dixon and Naegele conceded that they were public officials, and so the jury was fully instructed on Dixon and Naegele's heavy burden of proving, by clear and convincing evidence, actual malice on the part of Bays, for whose acts and conduct Ogden concededly was responsible. Because the alleged defamatory falsehood was one of innuendo, the trial court also instructed the jury that Dixon and Naegele had the burden to prove, by clear and convincing evidence, that Bays wrote and caused publication of the two news articles "with actual knowledge" or "with a high degree of awareness that the conclusions to be drawn from the articles were false and that those false conclusions

would logically follow from the publication." The trial court, of course, instructed the jury as to the issue of a defamatory meaning and the issue of falsity, and as to the plaintiffs' burden of proving each by, at minimum, a preponderance of the evidence.

The six-person jury returned verdicts which awarded to each plaintiff compensatory damages of $250,000 and (under an instruction permitting punitive damages only where and to the extent that compensatory damages are insufficient to dissuade malicious libel in the future) punitive damages of $25,000; and the trial court accordingly entered judgment in favor of Dixon and Naegele on November 10, 1988. (App., p. A-69.) Ogden timely filed its motion for judgment notwithstanding the jury verdicts or, in the alternative, for a new trial, alleging a multitude of grounds, most of which were

constitutionally based. (App., p. A-63.) Except for disallowance of the jury's awards of punitive damages,[2] the trial court denied Ogden's motion by order entered on March 9, 1989. (App., p. A-59.)

On appeal to the West Virginia Supreme Court of Appeals, the judgment of the Circuit Court of Ohio County, West Virginia, was reversed. (App., p. A-3.) The West Virginia high court cited as its reasons for the reversal its conclusions, arrived at independently through the enhanced appellate review required by the

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[2]While counsel for Dixon and Naegele disagrees with the conclusion reached in Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 211 S.E.2d 674, cert. denied, 423 U.S. 882 (1975), and applied by the trial court, that the first amendment restricts awards of punitive damages, he did not cross-assign error on appeal to the disallowance of punitive damages because the degree of culpability required of Ogden's management for the imposition of punitive damages against Ogden was not present in this case. See Restatement (Second) of Torts § 909 (1977).

first amendment to the United States Constitution, that the two news articles of May 3, 1983, together with any innuendo reasonably flowing from them, were not defamatory as a matter of law, and that Dixon and Naegele had failed to prove actual malice on the part of Bays with convincing clarity. (App., p. A-5.) The petition of Dixon and Naegele for rehearing and re-argument (App., p. A-41) was denied by the West Virginia Supreme Court of Appeals by order entered on May 13, 1992 (App., p. A-1).

C. Background Events and Climate

Before examining the relevant portions of Stefanow's 1983 trial testimony and comparing them to the offensive passages of the news articles of May 3, 1983, it is first necessary to explain the background events which occurred in the Wheeling area in the late 1970's and the early 1980's

and to describe the political climate of the time—for even in Wheeling, West Virginia, intense coverage by a newspaper of the trial of a person accused of a minor infraction is a rarity of sorts.

In 1972, George Stefanow retired from the United States Navy as a much decorated officer after thirty years of service, including service in combat zones during each of three wars. He returned with his wife to his hometown of Wheeling, West Virginia, in 1972, and settled in the Center Wheeling area in 1977, where he had been reared as a child and a young man. He acquired and operated a tavern in Center Wheeling, and he and his wife, Charlotte, acquired and operated a restaurant and a gift shop in the same area. Stefanow was appalled by the widespread and open heterosexual and homosexual prostitution in the Center Wheeling area, which, because of such prostitution,

had become known in some circles as "the meat rack." He urged the Wheeling Police Bureau to take action to remove the prostitution problem and, as well, to eliminate drug trafficking in the area. His pleas were to no avail, Stefanow maintained.

Stefanow then embarked on his own investigation into the prostitution and drug-trafficking problems. Stefanow claimed that, as a result of his investigation, he learned that the operators of most houses of prostitution in the area paid protection money to the police, and those who did not pay were raided frequently by the Wheeling Police Bureau's vice squad. Furthermore, Stefanow contended that members of the vice squad often kept for themselves money, drugs, and other evidence seized in vice raids, and contended that the Chief of the Wheeling Police Bureau, Edward L. Weith,

Jr., and the Bureau's Chief of Detectives, Joseph S. Davis, had suppressed and obstructed the prosecution of their sons and the relatives of other high-ranking police officers for various felonies and misdemeanors, including drug trafficking. Stefanow voiced his accusations to various local, state, and federal authorities, including the Wheeling City Council. He also sought a seat on the Wheeling City Council in 1982, promising to electors that he would end corruption and illegal practices within the Wheeling Police Bureau. Stefanow's accusations were reported by the news media throughout the Wheeling area. In return, members of the Wheeling vice squad, and other high-ranking police officers, publicly insinuated that Stefanow was connected to organized crime and that his campaign to cleanse the Wheeling Police Bureau of al-

leged corruption was actually an effort to disrupt the Wheeling Police Bureau's crime-fighting activities. In 1982, suits and countersuits were brought by members of the Police Bureau against Stefanow, and vice versa, for alleged defamations and alleged instances of malicious abuse of civil and criminal process. Moreover, warrants for alleged petit offenses flew back and forth between the police and Stefanow. All of this was eagerly and frequently reported by the local news media, even though nothing ultimately came of any of the suits and charges.

Some members of the Wheeling Police Bureau, including Dixon, had earlier investigated some of the matters about which Stefanow later complained and believed that some of the matters had substance. Dixon and other officers had been reprimanded and even demoted for their earlier efforts. They had been

told by Chief of Police Edward L. Weith, Jr., and Chief of Detectives Joseph S. Davis that "the police department takes care of their own dirty laundry" and that the officers were expected to "go along with the program." (Transcript of libel trial, pp. 266-67.) Later, when Dixon and other members of the Wheeling Police Bureau sought to process the complaints of victims of alleged thefts by members of the vice squad, they again were reprimanded. As a consequence, the allegiance of a substantial number of officers, including Dixon and Naegele, to the chief of police and the chief of detectives, who together ran or orchestrated the Bureau, evaporated, and morale within the Bureau deteriorated.

Bays, then an admittedly close personal friend and daily visitor of the chief of detectives, had been reporting the dissension within the Police Bureau in

a series of articles which had appeared in The Intelligencer, having described the problem as a "rift" or "split" in the ranks. In a story authored by Bays and appearing on page one of The Intelligencer on March 12, 1983, Bays reported that the "split in the ranks of the Wheeling Bureau of Police appeared to grow wider . . ." when a police officer, who supposedly witnessed a night-club altercation involving the son of the chief of detectives, refused to testify in the Magistrate Court of Ohio County, West Virginia, on behalf of Dixon and William S. McCormick, a former police officer. (App., p. A-125.) That article (admitted into evidence) bore the headline "RIFT IN POLICE RANKS APPEARS TO WIDEN."

Four days later, on March 16, 1983, another page-one story written by Bays appeared in The Intelligencer under the

headline "WEITH FAULTS 'OUTSIDE INFLUENCE'." (App., p. A-136.) Practically the entire article (admitted into evidence) consisted of Chief Weith's exculpatory comments about the cause and reasons for the dissension noted in the series of earlier articles, particularly the article of March 12, 1983. Weith, in the article of March 16, 1983, blamed the dissension on outside influences "who," he said, wanted "to open things up" for more vice and crime in Wheeling and "who" wanted a new chief of police in order to accomplish the goal. Those "five or six or seven" members of the Police Bureau who wanted a new chief of police, Weith opined, sided with the outside influences and wanted more illegal activities too, noting that police undercover work and vice raids had been frustrated because "information" was being "leaked" to outsiders by disgruntled officers responsible for the dissension:

> He [Weith] said he feels certain some police department information has been "leaked" to outsiders.
>
> "We've sent new men out on undercover work, and on assigned raids, and their identity has been known by the time they left the building," Weith said.
>
> "We can't keep the identity of a new officer secret. Their description is given to certain people. . . ."
>
> Trying to prove who is responsible for this "is next to impossible," Weith said. "But we have pretty good ideas who has been responsible."

The "outside influence," "outside influences," and "outsiders" to which or whom Weith referred in his published comments included, or were intended to mean, George Stefanow, testified Weith (Transcript, pp. 385, 394), suggested Bays (Transcript, pp. 592-93, 604), and suggested Assistant Prosecuting Attorney A. Dana Kahle (Transcript, pp. 133-34), who had prosecuted Stefanow in the 1983 telephone-threat

trial.

Thus, at the time of the publication on May 3, 1983, of the two news accounts of Stefanow's misdemeanor trial and testimony, readers of The Intelligencer already had been led to believe that sensitive and confidential police "information" was being "leaked" to the underworld by a small number of disgruntled, criminally-motivated policemen who were in league with the underworld, and that Stefanow probably was a member of the underworld. That the reading public had been led to those conclusions is evidenced by the testimony of Thomas Briley, who had been executive editor of The Intelligencer at the time, and by the testimony of Bays. Both Briley (Transcript, pp. 498-99, 503) and Bays (Transcript, corrected p. 566 through p. 567) testified that Stefanow's 1983 trial testimony was newsworthy and warranted separate space be-

cause Stefanow's "informants" on the police force had been revealed in his testimony. There was a "need," testified Bays, for two articles and for obtaining and publishing the comments of Chief Weith about Stefanow's identification of his "informants" on the police force, as a follow-up to the earlier articles written by Bays, particularly the article published on March 16, 1983. (Transcript, pp. 557-58, 573, 580, 599.)

D. A Comparison of Stefanow's Testimony to Bays' News Accounts

A comparison now seems appropriate of Stefanow's actual testimony adduced during his misdemeanor trial on May 2, 1983, to Bays' version of the substance and highlights of that testimony which appeared in The Intelligencer on May 3, 1983.

Stefanow's attorney[3] called Stefanow as a witness in his own defense at trial.

Although much haggling between Stefanow's attorney and the State's attorney took place throughout direct examination of Stefanow, the questions and answers, for the most part, related to the alleged telephone threat. On cross-examination, however, much testimony was elicited that obviously was irrelevant and immaterial to the issues then being tried.[4] During cross-examination of Stefanow (App., pp. A-105 through A-122), the fol-

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[3]Stefanow's attorney, William R. Metzner, also is counsel for Dixon and Naegele in their libel suits. However, William R. Metzner did not become counsel for Dixon and Naegele until 1987, when their attorney, Joseph W. Bonie, of Weirton, West Virginia, left West Virginia and withdrew as their counsel in the libel cases.

[4]Stefanow's attorney allowed the irrelevant and immaterial testimony because he did not want it to appear to the jury that anything was being held back or concealed by Stefanow, since the attorney's evaluation of the jurors at that point indicated that the case was in a posture to be won.

lowing questions were asked and the following answers were given:

> Q. Mr. Stefanow, when did you first become aware of the length of time Officer Heldreth had been on the police force?
>
> A. When I checked into it with the Clerk's Office.
>
> * * * *
>
> Q. [A]fter Officer Heldreth swore out the warrant?
>
> A. It was after that. Yes, sir.
>
> * * * *
>
> Q. And you testified here that you were upset because he had only been on the force two days and what did he know about law; isn't that correct, sir?
>
> A. Because other police officers told me how long he had been on the police force.
>
> Q. Before you called him [Heldreth] other police officers told you that?
>
> A. Oh, yes. I have information from other police officers.
>
> Q. You had information from

other officers between the time the residence of 2126½ Market Street was raided and the 17th of July, two days, from other police officers; is that what you are telling us?

A. Yes. I am.

Q. Would you tell us the names of those police officers that gave you that information?

A. I will not because it would tend to incriminate them.

Q. Well, if it would tend to incriminate them...

A. The police officers.

Q. I don't believe you have the privilege...

A. Well, I have that privilege.

* * * *

(Whereupon, Mr. Metzner and Mr. Stefanow confer.)

Q. (By Mr. Kahle) Would you tell us the names of the police officers that informed you of the raid? Let me put it a little closer in time so there is no misunderstanding.

Who informed you of the raid at 2126½ Market Street or Main Street?

A. Uh-huh.

Q. Between the time of the raid and the time you called Officer Heldreth. Tell us the names of those officers.

A. Well, my brother-in-law was one.

Q. Who is that?

A. Patrolman Naegele.

Q. Patrolman Naegele told you of the raid?

A. Yeah. Later.

Q. I am talking about between the 15th, when the raid occurred and the 17th when you called this man [Heldreth]. That's the ones you said...

A. No. No. I got the call directly from the people that owned the building.

Q. You got the call directly from the people that owned the building?

A. That is right.

* * * *

Q. That is Lucille Riggi?

A. Right.

Q. And what time did she call?

A. I don't have no idea what time of the day it was.

Q. Well, was it the next day or was it the night of the raid?

A. It was about the next day.

* * * *

Q. Then, it wasn't police officers that told you; was it?

A. No. Not at that time. But, I discussed it later with police officers.

Q. Who were the police officers you discussed it with?

* * * *

A. Donald Naegele.

Q. Any other police officers?

A. Sergeant Dixon.

Q. Sergeant Dixon. When did you discuss it with Sergeant Dixon?

A. I don't recall the exact date. It was after the raid.

Q. How long after the raid?

A. I have no idea. It might have been a day, two days, three days.

Q. Shortly after the raid? Within a week?

A. Within a week.

* * * *

Q. (By Mr. Kahle) Then, your sole information was from Lucille Riggi?

A. Now, I would like to add another thing. The next day when I found out about it, okay, when my name was used, when I got the phone call, I went to the City Building and I approached Chief Weith and he called Detective Joe Davis in with him.

I asked Joe Davis why when they made a raid down there, why they would have somebody use my name and Joe Davis informed me we use any ploy we can, anybody's name or any ploy we can to get into a house of prostitution.

* * * *

> And all it got—my answer was from the Chief and Joe Davis was just a smirk and a smile. In other words, they wasn't going to do anything about it. * * *

Counsel for Dixon and Naegele, of course, inserted the underscores of words and lines in the questions and answers quoted above. Those words and lines, maintain Dixon and Naegele, made it perfectly clear to those who heard Stefanow's testimony that all of Stefanow's discussions with Dixon, Naegele, and others about the vice raid of July 15, 1982, had been after the occurrence of the raid and not before.

On the morning of May 3, 1983, a news article written by Bays appeared on the front page of The Intelligencer under the headline "STEFANOW: POLICEMEN SUPPLIED INFORMATION," with the page-three continuation of the article bearing the headline "DATA SOURCE CLAIMED." (App.,

p. A-144.) That news article appeared on the front and third pages of every edition of the newspaper throughout the newspaper's entire area of circulation.

Another news article written by Bays appeared on the first page of the second section of the "city edition" of The Intelligencer, and was entitled "STEFANOW FOUND INNOCENT IN PHONE THREAT." (App., p. A-150.) This article appeared in no other regional edition, and so its circulation was limited to Wheeling and surrounding suburbs.

The lead-in paragraph of the article which bore the headline "STEFANOW: POLICEMEN SUPPLIED INFORMATION" stated:

> Wheeling tavern owner George Stefanow testified Monday that his brother-in-law, Patrolman Donald Naegele, and Sgt. Ronald Dixon of the Wheeling Bureau of Police supplied Stefanow information about a vice raid last summer.

After noting that there had been diffi-

culty in serving subpoenas so that the trial could proceed uninterrupted, and that Stefanow had been found innocent of the alleged telephone threat, the article continued:

> Highlighting testimony was Stefanow, who revealed Naegele and Dixon offered him information about the vice raid on an alleged house of prostitution at 2126½ Main St. last July 15.
>
> Stefanow, however, did not say if the information discussed was official police business.
>
> Police Chief Edward Weith Monday night said he would "study the testimony" given, to determine if any "official police business had been leaked out."
>
> In the past, Weith has charged that outside influences had been causing a split in the ranks of the police department and that officers discussing "police business" had been creating problems within the ranks.
>
> The chief said Stefanow's testimony Monday does not in itself indicate any wrongdoing.

> "We would have to determine exactly what was discussed and see if official police business had been leaked out."

The article which carried the headline "STEFANOW FOUND INNOCENT IN PHONE THREAT" contained the following passages relative to Stefanow's testimony. While a careful comparison of Stefanow's actual testimony to the quotations attributed to Stefanow in the article reveals that not one of the quotations was accurate, counsel for Dixon and Naegele has underscored only those fabrications which, he believes, materially altered the meaning of Stefanow's testimony when considered in conjunction with the critical omission of any reference to the clearly expressed post-raid time frame during which Stefanow's discussions with Dixon, Naegele, and others had taken place:

> Defense testimony presented by Stefanow indicated that he discussed the prostitution

raid on the Green Door with at least two police officers, and he testified that both had offered information to him.

Under questioning by Ohio County Assistant Prosecutor A. Dana Kahle, Stefanow identified his informants on the police force as "my brother-in-law Don Naegele and Sgt. (Ronald) Dixon."

Stefanow had at first refused to identify his "sources" on the police force "because it might incriminate the officers," but after consulting with his attorney, William Metzner, he agreed to testify about information given him concerning the vice raid in Center Wheeling.

"I discussed it with Don Naegele and Sgt. Dixon," Stefanow said. In answer to a question from Kahle, Stefanow said he "sometimes asks" the two police officers questions "and they give me information."

However, there was no testimony as to exactly what was discussed between Stefanow and the police officers. Stefanow said it was common knowledge that a "rookie" is used on vice raids and that he had "obtained information" about Heldreth before he had

ever met the new policeman.

"Police officers told me he had only been on the force for two days," Stefanow told the court. He further said "I had been alerted" about Heldreth.

He identified Lucille Riggi, who has been cited by police for operating an alleged house of prostitution, as one person having given him information on the new officer and the vice raid.

Stefanow said Mrs. Riggi told him that the raid was successful because the rookie policeman gained entrance to the alleged house by using Stefanow's name.

In reviewing the passages quoted above, particularly the last four, one should keep in mind that, in the presence of Bays, Stefanow clearly testified in his misdemeanor trial on May 2, 1983, on direct examination, that he "never met" (App., p. A-88) and "never knew" and "had never seen" (App., p. A-104) Officer Heldreth until after the vice raid of July 15, 1982, and, on cross-examination,

that "I never heard of the man [Heldreth]" and "I wanted to find out who he was because I had never heard of him before" the vice raid (App., p. A-107).

It is interesting to note that Warren Bays never was asked, on direct examination by Ogden's attorney at Dixon and Naegele's 1988 libel trial, whether or not he knew, while writing the news articles of May 3, 1983, that Stefanow had testified that his discussions with Dixon, Naegele, and others had taken place only after the vice raid. All that was asked of Bays about Stefanow's discussions of the vice raid were the questions, "And did you check the story [news articles] against your notes for accuracy?" and Was any such check for accuracy "to the best of your ability at that time?", to each of which Bays answered yes. (Transcript of libel trial, p. 558.) Asked why he had not spoken with

the court reporter before writing the news articles, Bays replied that "in our profession" it is "common knowledge" that "I could be charged with tampering or attempting to tamper with it [the transcript]." (Transcript, p. 539.)

During cross-examination, Bays steadfastly maintained that "the story [each news article] is complete as it appears" despite the omission from each article of any mention of the post-raid time frame of Stefanow's discussions about the vice raid. (Transcript, p. 624.) After awhile, however, Bays professed that, although he had been able to hear Stefanow's testimony from his vantage point in the magistrate courtroom (Transcript, p. 612) and had, in fact, heard it (Transcript, p. 614), he nevertheless had been confused[5] about the time

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[5]In the written opinion of the West

frame of Stefanow's discussions with Dixon, Naegele, and others (Transcript, pp. 622, 623). Somewhat perplexed by a series of seemingly evasive answers from Bays, counsel for Dixon and Naegele later made the following inquiry of Bays, to which Bays responded with the following answer (Transcript, p. 625; emphasis added):

> Q. Well, I asked you for your state of mind at the date of Stefanow's trial when you heard his testimony. Now, you said it was cloudy and uncertain and/or confusing as to

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Virginia Supreme Court of Appeals (App., p. A-5) delivered by Justice Brotherton on February 27, 1992, in this libel case, Bays was erroneously and improperly quoted as having testified at trial that "I think it [the post-raid time frame of Stefanow's discussions] was unclear to an awful lot of people" (App., p. A-32). The quotation is from page 31 of the pre-trial deposition of Bays taken on June 27, 1988, which was never introduced or read into evidence. No such statement was made by Bays at trial. If it had been, an objection certainly would have been interposed and upheld.

the time frame to which Mr. Stefanow referred. You knew that at the time. Now, is that your answer or do you want to amend that?

A. No, I am not going to amend it. That's my answer.

In the presentation of their case in chief, Dixon and Naegele offered their own explanation for the discrepancies between Stefanow's 1983 trial testimony and Bays' news accounts of the testimony. It was not merely Bays' professed confusion, or even conscious recklessness, which had given rise to the discrepancies. Instead, they contended that the discrepancies had been deliberate and offered the testimony of Bernard Watson, a friend and former employee of Stefanow, and the testimony of Charlotte Stefanow, Stefanow's wife, in partial support of their position.

Mrs. Stefanow first testified that she clearly had heard and understood Stefanow's 1983 trial testimony from her

position in the magistrate courtroom near or next to Bays, and that there had been no distractions while Stefanow was testifying. (Transcript, pp. 348-50.) She further testified that just after the magistrate-court jury had returned its verdict acquitting Stefanow of the telephone-threat charge, she observed Lt. Joseph S. Davis, Bays' close friend, "pacing back and forth" near the courtroom door and noticed that Davis "was rather red in the face." (Transcript, p. 357.) Davis held the courtroom door open for Bays, she continued, and Davis and Bays exited the courtroom together, conversing as they passed Watson, who was standing near the door. (Transcript, p. 357-59.) Watson testified that as Davis and Bays passed him, Davis was using "nasty language" and "snarled" to Bays over his shoulder, "You get these MF's [using the unabbreviated epithet]!"

(Transcript, pp. 457-58.) In response to that remark, continued Watson, Bays "sort of grinned and nodded his head like and they walked on by." (Transcript, p. 458.)

Ogden chose not to cross-examine Watson.

III.

ARGUMENT

A. False and Defamatory Connotation

According to the written opinion of the West Virginia Supreme Court of Appeals (App., p. A-5) published in this libel case, the court reversed the judgment of the trial court rendered in favor of Dixon and Naegele apparently for two reasons: (1) the articles written by Bays, together with any resulting innuendo, were not defamatory as a matter of law, and (2) Dixon and Naegele failed to prove actual malice by clear and convincing evidence. The first reason for reversal poses some difficulty to the petitioners because the court's explanation of the matter is rather fragmentary and sparse.

To illustrate, the court stated the following with respect to the first reason for reversal:

The newspaper argues that the plaintiffs failed, as a matter of law, to adequately demonstrate either the falsity of the story or that the story was published with the actual malice required by New York Times Co. v. Sullivan . . . and its progeny. We agree that the constitutional evidentiary requirement was not met in this case, and for the reasons set forth below, we reverse the judgment of the Circuit Court of Ohio County.

* * * *

In its defense, the newspaper offers that the contents of the two stories were true and accurate. . . . The newspaper submits that when the context [content] of an article is substantially true, innuendo alone is insufficient to support a public official's claim of libel. Further, because First Amendment defenses are involved, a trial court must make an independent determination of whether an article is capable of a defamatory connotation . . . .

* * * *

"A court must decide initially whether as a matter of law the challenged statements in a defamation action are

> capable of a defamatory meaning." Syllabus point 6, Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778 (1986).
>
> * * * *
>
> The appellant argues that the articles written by Bays, together with any innuendo that could reasonably flow from their omission of the fact that the vice raid information was not communicated to George Stefanow until after the raid, are not defamatory as a matter of law and the court erred in failing to make this preliminary finding. We agree.

After the last paragraph quoted above (App., p. A-24), the court quickly changed the topic to the issue of actual malice, which it pursued for the remainder of its written opinion (App., pp. A-24 through A-40).

The court's notion that the issue of a defamatory meaning or connotation is a matter of constitutional law to be decided independently by the court comes largely from the court's decision in Long v. Egnor,

176 W.Va. 628, 346 S.E.2d 778 (1986). In the Long case, the West Virginia Supreme Court of Appeals awarded a writ of prohibition to a school employees' union to prohibit a libel suit, brought by members of a county board of education, from proceeding further after the trial court denied the union's motion to dismiss the suit. In the libel suit, the board members had complained that they were libeled by a union memorandum to union members stating that an unidentified board member would "systematically deny all grievances" filed by union members in the future.

The West Virginia high court in Long reaffirmed the general rule summarized in syllabus point 3 of Chapman v. Kane Transfer Co., 160 W.Va. 530, 236 S.E.2d 207 (1977), that ordinarily a

> "trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears

> beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Long v. Egnor, supra, 346 S.E.2d at 782.

However, said the court, "we believe that where First Amendment rights are implicated, courts have applied a stricter standard in judging the sufficiency of a complaint." Ibid. (Emphasis added.) The court then went on to formulate the rule, expressed in syllabus point 6, that "a [trial] court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning."

In formulating the rule, the West Virginia high court relied heavily on New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny, particularly Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970), and Garrison v. Louisiana, 379 U.S. 64 (1964),

which, the court concluded, make it

> "clear that the United States Supreme Court conducts an independent review of the evidence in libel cases to determine as a matter of constitutional law whether the statement was libelous or was made with actual malice." Long v. Egnor, supra, 346 S.E. 2d at 784. (Emphasis added.)

The court in Long then reiterated its earlier conclusion in Mauck v. City of Martinsburg, 167 W.Va. 332, 280 S.E.2d 216, 220 (1981), that under New York Times Co. v. Sullivan, supra, "whenever there is a First Amendment defense to actions under state law, the state court [including the trial court] is required to be a judge of both the facts and the law." Long v. Egnor, supra, 346 S.E.2d at 787. Thus, the duty of independent review of "constitutional facts" as discussed and refined by this Court in Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), has, in West

Virginia, been passed in large measure to trial judges to perform initially by reason of the rule formulated in Long.[6]

It is submitted that the issue of whether or not a particular statement is defamatory or carries a defamatory connotation has not yet been placed under the protective umbrella of the first amendment by the United States Supreme Court, and that the West Virginia Supreme Court of Appeals confused, in Long, the issue of a defamatory meaning with the issue of falsity. This Court said in Milkovich v.

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[6]It is perhaps in unexpressed recognition of the idea that a jury should have some function that the West Virginia Supreme Court of Appeals altered its conclusion in the body of the Long opinion that "the critical issue that must be decided by a [trial] court initially is whether the challenged statements are defamatory," Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778, 787 (1986), by stating in syllabus point 6 that such critical issue is whether as a matter of law the challenged statements "are capable of a defamatory meaning." (Emphasis added.)

Lorain Journal Co., 110 S.Ct. 2695, 2706 (1990), that the line of cases of Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, supra; Letter Carriers v. Austin, 418 U.S. 264 (1974); and Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), stands for the proposition that full first-amendment protection will be afforded to statements, such as rhetorical hyperbole and imaginative expression, which cannot reasonably be interpreted as stating or implying "actual facts" about a person or which are not "sufficiently factual to be susceptible of being proved true or false." In such instances, a libel plaintiff is unable to discharge the burden of proving falsity which has been cast upon him by the first amendment. E.g., Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

It is further submitted that the issue of a defamatory meaning or connota-

tion in the case at bar should have been purely a question of West Virginia law, unaffected by first-amendment law, and that the alleged defamatory implications of the news articles published in The Intelligencer on May 3, 1983, were sufficiently factual to be proven false. Thus, the West Virginia Supreme Court of Appeals erred when it held that the news articles, and any connotations reasonably flowing from them, were not defamatory as a matter of law, and should have given to the jury's finding of defamatory implications, inherent in its verdicts for Dixon and Naegele, the same weight on appeal as it would have given if the case had been an ordinary tort case. Ordinarily, a jury's finding or verdict in West Virginia will not be disturbed on appeal unless the evidence plainly and decidedly preponderates against the finding or verdict. E.g., Nationwide Mut. Ins. Co. v.

Conley, 156 W.Va. 391, 194 S.E.2d 170 (1972).

It is finally submitted that if first-amendment considerations did cast upon the West Virginia Supreme Court of Appeals (1) the obligation of conducting independent appellate review and evaluation of the evidence of a defamatory meaning or connotation in the case sub judice, or (2) the obligation of deciding as a matter of law whether or not the news articles of May 3, 1983, were capable of a defamatory meaning or connotation, the court's conclusion in either instance— that the news articles were not defamatory— nevertheless was erroneous as a matter of first-amendment law for the reasons set forth below.

The trial court's charge to the jury included the contentions of Dixon and Naegele that "each of the news articles . . . of May 3, 1983, has a defamatory

or libelous meaning about the plaintiffs, by innuendo, insinuation or implication," and that

> "because the news articles did not mention that information about a police vice raid had been given by the plaintiffs to George Stefanow until sometime after the raid, but not before the raid . . . , readers of the newspaper derived the meaning that the plaintiffs were accused or guilty of misconduct, dishonesty or corruption in their occupations as police officers by divulging or "leaking" sensitive and confidential police information in advance of the raid, and perhaps in advance of other police raids and activities as well."

Dixon and Naegele introduced into evidence at trial the transcript of Stefanow's 1983 trial testimony and the allegedly libelous news articles of May 3, 1983, in which Bays purported to report the substance and highlights of Stefanow's testimony, and asked the jury to compare Stefanow's testimony to the news articles. Furthermore, Dixon and Naegele offered

into evidence the two earlier news articles, written by Bays, which had been published in The Intelligencer on March 12, 1983 ("Rift"), and March 16, 1983 ("Outside Influence"), and offered into evidence the testimony of numerous witnesses to prove the other background events and climate recited earlier in this Petition (pp. 14-24).

At this juncture, it should be noted that Dixon and Naegele revealed at trial the full nature and extent of their discussions with Stefanow concerning the police vice raid of July 15, 1982. In response to Stefanow's inquiry over the telephone within several days after the vice raid, Dixon, who then was at the Police Bureau, told Stefanow that the complainant's name on the prostitution complaint, which had been posted in the Police Bureau for release to the news media and public, was Robert Heldreth.

(Transcript, pp. 162-63.) In response to Stefanow's inquiry over the telephone shortly after Stefanow had talked to Dixon, Naegele, who was then at his home, told Stefanow that he never heard of Heldreth. (Transcript, pp. 309-310.) Dixon and Naegele further testified at trial that they never divulged to anyone outside the Police Bureau, at any time in their careers as police officers, any sensitive police information, or any information about any covert police operation in advance of the operation. (Transcript, pp. 162-65, 212, 312-13.) Their testimony on these points was uncontested. Thus, falsity of the alleged defamatory implications was proven beyond question in two senses: (1) Stefanow testified repeatedly in his 1983 misdemeanor trial that he had not discussed the vice raid of July 15, 1982, with Dixon and Naegele until after the raid, as evidenced by the

transcript of his 1983 testimony (which was stipulated by the parties as accurate); and (2) Dixon and Naegele never "leaked" sensitive police information to Stefanow or anyone else in their careers, as evidenced by their unchallenged testimony.

It is difficult to imagine any news article more fact-laden in the minds of readers than one which purports to report the substance and highlights of a witness' testimony in a judicial proceeding, particularly when the writer frequently employs quotations. Frequent quotations deliver the impression of substantial accuracy and authenticity. Quotations do not convey to the reader the idea that the author is giving only his interpretation of what an inarticulate speaker said. See Masson v. New Yorker Magazine, Inc., 111 S.Ct. 2419, 2433-34 (1991). And the more frequently that statements in an article are attributed to a speaker by the

use of quotation marks, the more likely it is that reasonable readers are led to believe that unquoted material attributed to the speaker in the article also is substantially accurate and true and that the entire article is thorough and complete.

The news articles written by Bays, which purport to report the substance and highlights of Stefanow's 1983 trial testimony, set forth many quotations to attribute speech to Stefanow and other persons. The articles therefore suggest substantial truth, substantial accuracy, and completeness. As we have seen in an earlier part of this Petition (pp. 24-37), however, a comparison of Stefanow's testimony to the contents of Bays' news articles reveals inaccurate and fabricated quotations and the omission of a critical fact—the post-raid time frame of Stefanow's discussions with the petitioners about the raid.

Most courts which have considered the matter have recognized that a false, defamatory conclusion arising from substantially true facts in a news story is not actionable by a public official unless there are material facts omitted from the story which, if reported, would have changed the meaning or gist of the story by preventing readers from being misled to the false, defamatory conclusion. If so, the implied conclusion is tantamount to, and on an equal footing with, an explicit statement. See, e.g., Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 477 A.2d 1005 (1984); DeFalco v. Anderson, 209 N.J.Super. 99, 506 A.2d 1280 (App. Div. 1986); Diesen v. Hessburg, 455 N.W.2d 466 (Minn. 1990); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.) (en banc), cert. denied, 479 U.S. 883 (1986). Until Masson v. New Yorker Magazine, Inc., supra, however, courts

for the most part paid only lip service to the rule.

In Masson, this Court considered six published passages, taken from recorded interviews, in which the public-figure plaintiff had been misquoted, and concluded that five of the six published passages created jury questions as to falsity and actual malice. There, this Court observed that, because of material alterations, "many of the quotations at issue might reasonably be construed to state or imply factual assertions that are both false and defamatory . . . ," Masson, supra at 2433, and concluded that the meaning of one of the plaintiff's recorded statements (treated under the Court's heading "He Had the Wrong Man") was materially altered by the omission, in the quoted passages, of part of what actually had been said, id. at 2437.

B. Actual Malice

In the case of Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S.Ct. 2678 (1989), this Court (clarifying the interrelationship of the clearly-erroneous standard for review of findings of fact and the constitutionally-based rule of independent appellate review of actual-malice determinations) held that a jury's "credibility determinations are reviewed under the clearly erroneous standard . . ." because the jury has had the opportunity to observe the demeanor of the witnesses. Id., 109 S.Ct. at 2696. This Court, more importantly, made it clear that an appellate court must first conduct a review of the evidence of the underlying facts in dispute to determine whose and what testimony the jury must have rejected on credibility grounds in light of the trial court's instructions

and the jury's answers to any special interrogatories, and then consider what is left along with the undisputed evidence. Ibid.

Moreover, in Harte-Hanks, this Court observed:

> "Although courts must be careful not to place too much reliance on such factors [motive and lack of care], a plaintiff is entitled to prove the defendant's state of mind [actual malice] through circumstantial evidence . . . , and it cannot be said that evidence concerning motive or [lack of] care never bears any relation to the actual malice inquiry." Id., 109 S.Ct. at 2686.

Earlier, in Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 211 S.E.2d 674, cert. denied, 423 U.S. 882 (1975), the West Virginia Supreme Court of Appeals, in a case of libel by misleading headlines over substantially true news stories, had recognized that "personal motives on the part of a newspaper, or participation by a

newspaper in a plan or scheme to injure, is . . ." evidence bearing on the actual-malice inquiry. Id., 211 S.E.2d at 688.

Following the Harte-Hanks approach of appellate review, what undisputed facts and circumstances disclosed by the evidence in the case at bar demonstrate cumulatively that the defamatory innuendo (identified in a preceding section) not only was anticipated or intended by Bays, but also was known by Bays to be false or probably false? The answer:

(1) Bays, a "proficient" and "detailed" reporter (Briley, Transcript, p. 510), was present throughout Stefanow's trial and heard and witnessed firsthand the entire testimony of Stefanow, who reiterated and emphasized clearly the fact that his discussions with Dixon and Naegele about the vice raid of July 15, 1982, had taken place after the raid, and yet Bays omitted to report that critical fact.

(2) Charlotte Stefanow, Stefanow's wife, was present throughout Stefanow's testimony, near or next to Bays, and heard and witnessed firsthand the entire testimony of Stefanow, and clearly understood from his testimony that the discussions with Dixon and Naegele had taken place only after the vice raid.

(3) Stefanow, in his 1983 trial testimony, identified by name not only Dixon and Naegele as police officers with whom he had later discussed the raid, but also Weith and Davis (the day after the raid), yet Bays made no reference in the news articles to the discussions with Weith and Davis except by reporting, in the inside article, that Stefanow had discussed the raid "with at least two police officers," naming only Dixon and Naegele. (Emphasis added.)

(4) Stefanow, in his 1983 trial testimony, did not say that any persons were

"sources" of information, did not say that Dixon and Naegele "give me information," and did not say that "I had been alerted" about Heldreth, and yet Bays fictitiously quoted Stefanow as having said those things.

(5) Stefanow, in his 1983 trial testimony, repeatedly said that he had never known or heard of Heldreth until after the vice raid of July 15, 1982, and yet Bays fictitiously quoted Stefanow as having said that "I had been alerted" about Heldreth.

(6) Bays reported that "there was no testimony as to exactly what was discussed between Stefanow and the police officers" (inside article) and that "Stefanow, however, did not say if the information discussed was official police business" (front-page article), and yet Bays (consciously confused, by admission, about the time frame of the discussions)

reminded readers about Chief Weith's earlier published charges that sensitive police information was being "leaked" in advance by criminally-motivated dissidents to frustrate undercover operations and elicited and reported Chief Weith's comments subtly suggesting that Stefanow's testimony implicated Dixon and Naegele in the wrongdoing.

(7) Bays was a close personal friend of police Lt. Joseph Davis for more than twenty-five years and had known Chief Weith as long, and was acutely aware of Stefanow's campaign to cleanse the Wheeling Bureau of Police of alleged corruption and of the consequent ongoing friction between Stefanow and his sympathizers, on the one hand, and Davis, Weith, and their allies, on the other.

(8) Bays devoted the entire front-page news article of March 16, 1983, which bore the headline "WEITH FAULTS 'OUTSIDE

INFLUENCE'," solely to Weith's exculpatory comments about the cause and reasons for the dissension within the Police Bureau, while not attempting to contact anyone else for any competing comments or in-put.

(9) Bays admittedly was (at the least) consciously confused about the post-raid time frame of Stefanow's discussions with Dixon and Naegele and knew that at the time he wrote the news articles of May 3, 1983.

What material facts and circumstances mentioned in the evidence in the case at bar and bearing upon the issue of actual malice were disputed? The answer: Bays denied that he talked to Chief of Detectives Joseph S. Davis at Stefanow's trial and denied that, at the end of the trial, he "grinned" and "nodded" in response to any angry demand of Davis to Bays for Bays to "get" Dixon and Naegele.

That the jury chose to believe the petitioners' witnesses and to reject Bays' testimony in material respects is evidenced by the findings which the jury indicated that it had made when returning its verdict forms awarding punitive damages. Each form instructed the jury that no punitive damages could be awarded unless

> "you find from clear and convincing evidence that [the plaintiff] has proved . . . actual malice and that the articles were published with a deliberate intent to injure [the plaintiff]." (Emphasis added.)

The jury was clearly convinced that, at the least, Bays wrote the news articles with a "high degree of awareness of . . . probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74 (1964), or with "serious doubts as to the truth . . . " of the defamatory implications, St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

IV.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the West Virginia Supreme Court of Appeals entered on February 27, 1992.

Respectfully submitted,

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Attorney for Petitioners

August 10, 1992